WONG KIM

v.

LOH KIM FOH

HIGH COURT MALAYA, IPOH
ABDUL HAMID EMBONG J
[ORIGINATING SUMMONS NO: 24-1189-2001]
28 AUGUST 2003

MENTAL DISORDERS AND TREATMENT: *Inquiry - Application for - Prerequisites - Whether prima facie case of mental disorder must first be proved - Whether judge to seek personal interview with insane - Failure to prove prima facie evidence - Whether fatal - Whether no inquisition could be held - Medical evidence - Value of - Mental Disorders Ordinance 1952 ss. 3, 6*

In this application by the plaintiff under s. 3 of the Mental Disorders Ordinance 1952 ('MDO') for an order that an inquiry be made into the state of mind of her 90-year old husband to determine whether he was mentally disordered and incapable of managing himself and his affairs, questions arose before the learned judge as to: (i) whether the court, before issuing the order for inquiry, ought to undertake a preliminary inquiry and determine whether there was *prima facie* evidence of mental disorder on the part of the defendant; and (ii) whether the application ought to be rejected *in limine* if such *prima facie* evidence was not forthcoming or established.

Held (dismissing the application):

[1] An order directing an inquiry into a person's state of mind is a very serious matter and is intended to be a judicial determination made only upon satisfaction by the judge of its necessity based on adequate material. Such determination could be arrived at with or without the assistance of medical opinions. (p 819 e)

[2] The court should first proceed by way of a preliminary inquiry with a personal interview of the defendant in chambers without the presence of counsels. Personal examination by the court, in any case, is provided for under s. 6 of the MDO. Clearly, unless and until this preliminary stage has been undertaken, and the court is satisfied that the application should proceed further, there can be no order for an inquiry. In short, an inquiry under s. 3 MDO would not be ordered as a matter of course and where no *prima facie* case is established after such a preliminary inquiry, the application may be rejected *in limine*. (pp 819 f, 820 f-h & 821 a)

[3] The defendant, at the interview, spoke freely and fluently and was cooperative and coherent. He was asked on various aspects of his personal life, including his background, family, business, experience during the Japanese occupation, relationship with his children and his health. These questions were posed in the main to test his memory and discernment of events. The court found him to be candid and cheerful. The interview lasted 55 minutes, and in the closing 10 minutes the court allowed counsels from both sides to join in to observe the continuing proceeding. At the end of the inquiry, the court is fully convinced that the defendant was completely of sound mind. The defendant was conscious of things, past and present, and did not demonstrate any sign of one who is mentally disordered by its legal definition. With the exception of a few lapses of memory, understandable for one who is now at an advanced age of 90, he was completely normal. (p 821 e-h)

[4] There was insufficient *prima facie* evidence to order an inquisition. As was observed in *Joshi Ram Krishnan v Rukmini Bai* [1949] AIR (36) Allahabad 449 "a man may find it difficult to answer questions of a particular class but if he intelligently answers questions of various other sorts concerning himself, his family and property, he cannot be classed with men of unsound mind being unable to manage his affairs". The application is thus clearly misplaced. (p 822 d-h)

Case(s) referred to:
Chou Kooi Pang & Anor v PP [1998] 3 SLR 593 ***(refd)***
Joshi Ram Krishan v. Rukmini Bai (AIR (36) 1949 Allahabad 449) ***(refd)***
Mt Teka Devi v Gopal Das & Anor AIR 1930 Lahore 289 ***(refd)***
Muhamad Yaqub v. Nazir Ahmad & Ors (Allahabad 1920 (Vol XLII) 504 ***(refd)***
Ong Chan Tow v. R [1963] MLJ 1960 ***(refd)***
Prem Singh & Ors v. Kirpal Singh [1989] 2 MLJ 89 ***(refd)***
R v. Turner [1975] QB 834 ***(refd)***
Rahima Bibi v. Hamida Bibi & Ors (AIR 1917 Madras 194) ***(refd)***
Richmond v. Richmond [1914] 111 LT 273 ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 45(1)
Mental Disorders Ordinance 1952, ss. 3, 6

Lunacy Act 1912 [India], s. 38

For the plaintiff - Douglas Yee (M/s Sivananthan); Vivekanandan Periasamy (M/s Selvam, Nanda & Partners); Segaran (M/s Maxwell Kenion Cowdy & Jones)
For the defendant - Ravi (AT P'ng & Haryati Hashim); M/s Ravi Beltran & Co

Reported by WA Sharif

JUDGMENT

Abdul Hamid Embong J:

The plaintiff, who was 76 years old at the time of making this application, is the wife of the defendant, now aged 90. They were married in 1938 and are blessed with six children, three sons and three daughters. The family is now embroiled in a bitter family conflict with allegations that the defendant had withdrawn huge sums of money from their joint accounts and transferring them into a joint account of the defendant and his third son, Loh Mui Fah. Her application under s. 3 of the Mental Disorders Ordinance 1952 (MDO) seeks for the following orders:

(i) an inquiry as to whether the defendant is mentally disordered and incapable of managing himself and his affairs;

(ii) a time and place be appointed for the inquiry;

(iii) The inquiry be directed to also determine the following:

(a) the nature of the properties belonging to the defendant;

(b) the nature of the documents executed by the defendant from 6 August 2001 until the date of the inquiry;

(iv) such other directions as may be necessary for the purposes of and consequent to the inquiry;

(v) that in the event that the defendant is mentally disordered and incapable of managing himself and his affairs, the charge of the defendant's affairs and his estate be committed to a committee or committees as this Honourable Court shall appoint with such powers of management as may be necessary and proper save that the powers shall not extend to the sale or charge by way of mortgage of the estate or any part thereof or to the letting of any immovable property, unless for a term not exceeding three years;

(vi) that the committee or committees appointed by this Honourable Court be expressly authorized to institute such necessary legal proceedings in the name of the defendant or on his behalf as his next friend as it may deem fit;

(vii) that the defendant do pay the costs of the proceedings;

(viii) that there be such further and/or other reliefs as may be just and necessary.

Prior to filing this application, the plaintiff had no complaints about the conduct and mental capacity of the defendant. When he left their matrimonial residence of No. 4 Jalan Thomson Ipoh in August 2001 to live with their third son, she started to complain of his forgetfulness, mood swing and change of attitude. This application was supported by five medical reports exhibited by the plaintiff to show the defendant's ailment and state of mind. The defendant in opposing this application also produced four medical reports on himself. I had scrutinised both sides' medical reports and found them to contain certain common findings which is that the defendant was suffering from Alzheimer disease (AD) of varying degrees and also from prostate cancer. The latter ailment is of course not mentally related.

Reference was made by the defence to the definition of AD as found in *Cambridge - International Dictionary of English* which states it as:

> a disease of the nervous system that is common in old people and which results in the gradual loss of memory, speech movement and the ability to think clearly. Alzheimer's disease affects an estimated one in five of the 2 million Britons over the age of 80.

The following extract from the Alzheimer Research Forum website was also referred to this court. It says:

> AD is the leading cause of dementia among older people. An estimated 10 percent of Americans over the age of 65 and half those over the age of 85 have Alzheimer's. More than 4 million Americans currently suffer from the disease. In popular imagination, AD is equated with an impaired memory, but the disease includes a number of other changes in brain function that result in inattention, disoriented behaviour, altered personality, difficulty in speaking and comprehending, and impaired gait and movement.

In a more advanced stage of AD, the following symptoms may occur:

1. A decrease in knowledge of recent events;
2. Forgetting events in life history, essentially losing awareness of who you are;
3. Problems choosing proper clothing;

4. Hallucinations, arguments, striking out and violent behaviour;

5. Delusions, depression and agitation.

In severe AD, a person can no longer survive without assistance. Most people in this stage no longer understand language, they no longer recognise family members, and they can no longer perform basic activities of daily living such as eating, dressing and bathing (Source: Alzheimer Disease Association USA).

A person suffering from severe AD or has at least traversed into its advanced stage, may in my opinion, be categorised as one who is mentally disordered as defined by the MDO in s. 2 which states:

> mental disorder means any mental illness, arrested or incomplete development of the mind, psychiatric disorder or any other disorder or disability of the mind however acquired;

It must be quickly qualified that the terms used in the abovementioned definition are legal and not medical categories. The determination of whether a person is mentally disordered is thus a judicial decision and one that could be arrived at by the court with or without the assistance of any medical opinions, although decided cases from other Commonwealth jurisdictions are of the view that the courts are better-placed in acting with the advice of medical opinions. The existence of expert medical evidence however does not relieve the court from the obligation of forming its own judgment (See *Richmond v. Richmond* [1914] 111 LT 273).

An application such as this however, ought to be supported by "some medical evidence in the nature of a medical certificate of some doctor who has had a reasonable opportunity of seeing the condition of the alleged invalid" (See *Muhamad Yaqub v. Nazir Ahmad & Ors* (Allahabad 1920 (Vol. XLII) 504).

The commentary by BR Boetra in his book on the *Indian Mental Health Act 1987* (Second Edition) on the responsibility of the court when faced with an application such as this is noteworthy, and is now quoted:

> A person does not become a 'lunatic' under the Lunacy Act on the debatable niceties of psychological and psychiatric theories. It is, therefore, essential that the Judge must apply his mind and wherever possible examine personally the lunatic unless he has good reason not to do so, in very exceptional case. It cannot be too much emphasised that it is not the ultimate responsibility of the mental specialists and specialist doctors whose views are always entitled to great deference, but it is the responsibility of the Court of Law to find and hold that a person is a 'lunatic' under the Lunacy Act and that he should be detained in a mental hospital. This responsibility on the court is serious

and heavy and must be discharged with great care and circumspection, and the court cannot do it vicariously through the medical and psychological specialists, though it can always and should preferably be guided by them." The above passage is now applied as a principle to guide this court in determining the matter at hand.

The opinions of experts are of course relevant facts under s. 45(1) of the Evidence Act and may be admissible to furnish the court with, as in this case, scientific information which is likely to be outside the experience and knowledge of a judge. If however a judge on the proven facts can form his own conclusions without help, the opinion of an expert is unnecessary (See *Chou Kooi Pang & Anor v PP* [1998] 3 SLR 593; *R v. Turner* [1975] QB 834). In *Ong Chan Tow v. R* [1963] MLJ 1960 it was held that expert opinion evidence of a psychiatrist to show how an ordinary person who was not suffering from mental illness was likely to react to the stresses and strains of life is not admissible as they are within ordinary human experience.

Which brings me to the medical reports, in all nine of them, adduced by both parties to support their respective stands. The plaintiff submitted five medical reports from different doctors, dating from January 2001 to support her applications. Two of those reports advert to his prostate cancer, a non-mental related ailment, one spoke of memory impairment in that the defendant was suffering from AD, two others expressed no opinions of the defendant's ailment, merely mentioning that the defendant was under treatment. The defence submitted four medical reports dating from October 2001 up to May 2003, to dispute the plaintiff's medical opinions. Those reports confirmed that the defendant either had AD or was suffering from the early stages of dementia affecting his memory function. However there was no opinion stated on his mental incapacity. In fact, one report unequivocally expressed that the defendant was not suffering from any mental disorder and was capable of managing himself and his affairs. Most telling in my view, was a current report dated 21.3.2003 from the Director of Hospital Permai Johor Bahru, a government institution charged with the care of patients suffering from mental disorders, who opined that the defendant though suffering from mild dementia (Alzheimer type) was certainly of sound mind and capable of managing himself and his affairs.

Faced with these expert medical opinions, I could have, even at the early stage when this matter was first called up for hearing on 20 June 2003, and having considered those medical opinions decided on a summary basis that this application was without merit and did not justify for an inquisition order to determine the defendant's state of mind. (See *Rahima Bibi v. Hamida Bibi & Ors* (AIR 1917 Madras 194). However, after conferring with learned counsels

from both sides and heeding favourably to their opinions, I had on that date agreed that this court should first proceed by way of a preliminary enquiry with a personal interview by the court of the defendant, in chambers and without the presence of counsels. I had also acceded to counsel's request that they be permitted to address the court on points of law after that said preliminary enquiry.

In deciding on this process I had been referred to and follow a number of Indian authorities, in particular *Muhammad Yaqub v. Nasir Ahmad & Ors* (ILR Allahabad 1920 (Vol. XLII) 504) which decided that the purpose of such a preliminary enquiry was for the judge to satisfy himself that there is a real ground for an inquisition. At this preliminary stage the judge should be satisfied that there is some *prima facie* evidence to establish that the subject is a person of unsound mind and incapable managing himself and his affairs.

Section 3 of the Mental Disorders Ordinance 1952 (MDO) which is in *pari materia* with s. 38 of the Indian Lunacy Act 1912, states as follows:

> Section 3: The court may on such application as is hereinafter mentioned, make an order directing an inquiry whether any person subject to the jurisdiction of the court who is alleged to be mentally disordered is or is not of unsound mind and incapable of managing himself or his affairs.

An order directing an inquiry into a person's state of mind is a very serious matter and is intended to be a judicial determination made only upon satisfaction by the judge of its necessity based on adequate material. For this reason a two-tier inquiry has been preferred under the Indian Lunacy Act 1912, the earlier or preliminary enquiry with a purpose of determining a *prima facie* basis for the inquisition order to be made under s. 3 MDO. In *Muhammad Yaqub* (cited earlier) His Lordships Piggot and Walsh JJ gave the following opinion on the procedure to be undertaken when the court is faced with an application of this nature, which is now followed. Their Lordships said this:

> We propose to make one or two suggestions, not applicable merely to this case but to all applications of this kind, to guide the learned Judges before whom these applications come. It is true that nothing is contained in the Act itself to direct or guide a Judge as to how he shall conduct applications for an inquisition and probably no rules exist for dealing with the matter, but ordinary common sense would appear to dictate to a tribunal before whom such an application comes that care should be exercised in a painful matter of this kind, namely, and inquiry into a man's or woman's state of mind; specially in the case of people in comfortable circumstances who merely wish to lead a quiet life, care should be exercised that they are not suddenly flung without sufficient reason into an elaborate inquisition which after all is nothing more or less than a trial involving sometimes the history of a person's life back for many years, medical evidence, and all sorts of family witnesses. An inquiry of that sort once started must be

> prosecuted to the bitter end and has all the attributes of an ordinary trial on an issue of fact, and therefore, when a person is alleged to be insane, before his or her family are cast into an elaborate proceeding of that sort, there ought to be a careful and thorough preliminary inquiry and the Judge ought to satisfy himself that there is a real ground for an inquisition. It is impossible to lay down any hard and fast rule, but in the first place it is essential that the person making the application should support it ordinarily by affidavit or by tendering himself for examination to the Judge on oath in support of the allegations in his application. The learned Judge would naturally want to know what relationship existed, what previous association had existed, between the applicant and the alleged insane person, how long the illness was supposed to have lasted, why no previous steps had been taken and what were the present symptoms and actual causes which had induced the applicant to make the application as and when he did. Certainly in England and in a place like Cawnpore (one hesitates to say it generally about these provinces), an application of this kind ought to be supported by some medical evidence in the nature of a certificate of some doctor, lady or otherwise, who has had a reasonable opportunity of seeing the condition of the alleged invalid. If no medical evidence is forthcoming of more recent date than 8 years before the application, so much the worse for the applicant. In many cases, and we think that this case is probably one, it would be very desirable that the Judge should seek some personal interview with the alleged insane, not with a view to forming a final opinion as to her real condition but to satisfy himself in the ordinary way in which a layman can do, that there is a real ground for supposing that there is something abnormal in her mental condition which might bring her within the Lunacy Act.

(See also the case of *Vemasani Narasamma v. Vemasani Rama Naidu* (AIR (38) 1951 Madras 648).

Personal examination by the court is provided under our s. 6 MDO which states:

> 6. At any time after the application for the inquiry the Court may require the person alleged to be mentally disordered to attend at such convenient time and place as the Court may appoint, for the purpose of being personally examined by the Court or by any person from whom the Court may desire to have a report of his mental capacity and condition, and the Court may also make an order authorizing any person or person named therein to have access to the person alleged to be mentally disordered for the purpose of a personal examination.

Thus, unless and until this preliminary stage has been undertaken and that the court is satisfied that the application should proceed further, there can be no order for an inquiry to be made. In other words, the court must be carefully

minded that it would not as a matter of course order an inquiry under s. 3 MDO. In *Prem Singh & Ors v. Kirpal Singh* [1989] 2 MLJ 89, an application for an order under s. 3 of the Singapore Mental Disorders and Treatment Act (Cap 178, 1985 Ed) which is the equivalent of our s. 3 MDO, was rejected and the learned Judicial Commissioner held as follows:

> Section 3(1) of the Act clearly gives a discretion to the court to determine whether in a particular case where a person is alleged to be mentally disordered, an inquiry should be ordered. It does not follow that an inquiry must be ordered in every case where it is shown that the person is of unsound mind and incapable of managing herself and her affairs.

Thus, until an order for an inquiry under s. 3 MDO has been made by the Court, no such inquisition can be validly held; it must in other words, be preceded by an order to that effect. And where no *prima facie* case is established after such a preliminary enquiry, the application may be rejected *in limine*. (See *Mt Teka Devi v Gopal Das & Ano*r AIR 1930 Lahore 289)

On 8 August 2003 in chambers, I conducted an interview with the defendant. Present was En. Ahmad Saifudin, the Malay interpreter and Puan Lim Bee Lian, the Chinese interpreter. The defendant's mother tongue is Hakka, but he chose to speak in Malay, save to clarify from the interpreter on some questions he could not comprehend. The defendant spoke freely and fluently. He was also cooperative and coherent. He was asked on various aspects of his personal life, including his background, family, business, experience during the Japanese occupation, relationship with his children and his health. These questions were posed in the main to test his memory and discernment of events. I found him to be candid and cheerful during our conversation. He also expressed a desire to return to his house after this legal dispute is resolved by the court. He stated that he had no quarrel with his children. He was also offered food and a drink, and asked for Nescafe and toasted-bread. There was an allegation by the plaintiff that the defendant was unable to handle his own food without assistance. He consumed the bread and coffee with ease and when asked what he was eating, nonchalantly responded that it was bread with kaya. The interview lasted 55 minutes, and in the closing 10 minutes I had allowed counsels from both sides to join in to observe the continuing proceeding. At the end of the preliminary enquiry I was fully convinced that the defendant was completely of sound mind. He was conscious of things, past and present and did not demonstrate any sign of one who is mentally disordered by its legal definition. He was, in my view, a completely normal person, with the exception of a few lapses of memory, understandable for one who is now at an advanced age of 90. In fact, for one his age, he surprised me with his capacity for comprehension.

At 12.20 pm, I adjourned the proceedings to open court and invited learned counsels to address the court. En. Douglas Yee and En. Segaran for the plaintiff submitted that since there was no dispute that the defendant was suffering from AD, the court, even at this preliminary stage should be guided by medical evidence and that medical questions by experts need to be asked. For the defendant, En. Ravi adverted to the plaintiffs medical report dated 19 November 2001 which mentioned that the defendant suffered only from memory impairment i.e. forgetfulness. None of the medical reports for the plaintiff spoke of mental incompetence or that the defendant was of unsound mind. The court must be wary that the presence of any one of the manifestations of mental abnormality does not necessarily label a person to be of unsound mind, that manifestation must be deep rooted and fixed in a person's psychology and cannot be removed by any amount of reasoning that he can be labelled as such. (See *The Mental Health Act 1987* by B.R. Boetra).

In the case of *Joshi Ram Krishan v. Rukmini Bai* (AIR (36) 1949 Allahabad 449) the appellate court made this comment an unsoundness of mind, from which I adopt in arriving at my decision:

> Unsoundness of mind implies some unusual feature of the mind as has tended to make it different from the normal and has in effect impaired the man's capacity to look after his affairs in a manner in which another person without such mental irregularity would be able to do in a matter of his own. The idea suggest some derangement of the mind, whatever be its degree, and it is not to be confused with or taken as analogous to a mere mental weakness or lack of intelligence. **A man may find it difficult to answer questions of a particular class but if he intelligently answers questions of various other sorts concerning himself, his family and property, he cannot be classed with men of unsound mind being unable to manage their affairs**. If a man is able to understand and answer questions on various matters except those relating to arithmetical calculations, he cannot be regarded as mentally unsound, although he would be held as having a weak or undeveloped mind. (emphasis added)

In this case, I was satisfied from the preliminary enquiry that there was insufficient prima facie evidence to order an inquisition. The underscored words in the passage quoted from *Joshi Ram Krishnan* above befit the description I would give the defendant after the court-conducted interview with him. The medical evidence, all considered, also militate against the idea of an inquiry being necessary. Having seen and heard the defendant I find this application to be not only disturbing, but also misplaced. I also find it to be incongruous to the overall scheme and purpose of the MDO, which in the main is to provide for the care, protection and treatment of a mentally disordered person. The

defendant is now locked in a family dispute. It is hoped that this falling-out amongst them will be quickly resolved so that his wish to go home can be met and in the process be reunited with the plaintiff. In the twilight of his life, he deserves some peace and quiet.

For these reasons, this application was dismissed with costs.